No. 21-6770

IN THE

Supreme Court of the United States

DAVE ELYSEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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May 18th, 2022

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REPLY BRIEF FOR PETITIONER

In the decision below, the Eleventh Circuit held that evidence of an inadequate police investigation into another suspect is legally irrelevant because it is not an "affirmative defense" to criminal liability. That holding is unprecedented. No court—state or federal—has ever said anything like that. And for good reason: it is dead wrong. "Affirmative defense" or no, the police's failure to investigate a known suspect can obviously be relevant because it can give rise to reasonable doubt. Categorically excluding such evidence as irrelevant defies common sense and this Court's precedent. It conflicts with the law in numerous jurisdictions. And it prevents innocent Americans from earning back their freedom at a trial by a jury of their peers.

Unable to defend what the Eleventh Circuit actually held, the government rewrites the opinion in an effort to sow confusion. But while the Eleventh Circuit's holding is hard to believe, it is not hard to understand. This Court should not allow the government to defeat review by retconning an unambiguous holding that will dilute the reasonable-doubt standard and lead to the conviction of innocent people.

The government's remaining arguments are about the facts of this case. But those arguments backfire because this case vividly illustrates the problem. The district court excluded evidence that the police failed to investigate someone who literally walked into the police station and confessed. Although that ruling prevented Petitioner from showing reasonable doubt at his trial, the Eleventh Circuit held that this evidence was irrelevant. Petitioner is now serving a 235-month sentence for a crime he did not commit. He will not be the last if the decision below goes unchecked.

I. The Government Mischaracterizes the Decision Below

The government is trying to pull a fast one. It claims that the Eleventh Circuit held *only* that an inadequate investigation is not an "affirmative defense." BIO 9–11, 14–15. That is simply not accurate. It does not even make sense. The issue on appeal involved the exclusion of evidence, not the "existence of an affirmative defense." BIO 11. Indeed, at no point during the trial or appeal did the parties even mention an "affirmative defense." What the panel actually held is that evidence of inadequate investigation is not "relevant" *because* it does not support an "affirmative defense." And irrelevant evidence cannot be admitted—not even to show reasonable doubt.

The panel's relevance holding is written in black and white. *See* Pet. App. 61a ("As we observed at the outset, [Elysee's] theory of relevance depends on the existence of an affirmative defense based on the failure of the police to conduct a reasonably thorough investigation."); Pet. App. 65a ("Because nothing in our caselaw indicates the existence of an affirmative defense based on the failure of police to conduct an investigation as reasonably diligent officers, we conclude that no such defense exists. Elysee's theory of relevance for Deen's confession hinges on such a defense, and his theory therefore collapses. Deen's confession was inadmissible because it was irrelevant."). The opinion repeatedly assumes (without legal support) that the failure to investigate another suspect can be "relevant" if—and only if—it supports an "affirmative defense." *See also* Pet. App. 17a–19a & nn.25–26, 28, 54a–55a, 57a–58a.

And that explains why the Eleventh Circuit ultimately upheld the exclusion of Deen's confession and Officer's Cabrera's investigatory response. That evidence did not support an “affirmative defense.” So, in the panel’s view, it was irrelevant. It did not matter to the panel whether that evidence would have created reasonable doubt.

While the government attempts to muddy the waters, everyone else to comment on the decision below has understood it the same way that Petitioner does. That includes: his amicus, *see* Clause 40 Foundation Br. 4 (“In crafting its opinion, the Eleventh Circuit disregarded how evidence of an unreliable police investigation is relevant to . . . a reasonable doubt defense. It instead assessed only whether such evidence is appropriate as” to an affirmative defense); Westlaw’s editors, *see* 993 F.3d 1309, 1309 (11th Cir. 2021) (characterizing the “holding” as follows: “out-of-court statements offered by defendant, i.e., purported confession that vehicle occupant made to officer, were not relevant in absence of showing by defendant of validity of his affirmative defense”); newsletters, *see* West’s Criminal Law News (Apr. 22, 2021) (vol. 38, issue 9) (same); and even criminal defense law blogs, *see* Defense Newsletter Blog, Elysee: Affirming 922(g) Conviction and Sentence After Disallowing Testimony Regarding Another Person’s Confession to the Charged Crime (Apr. 8, 2021) (“The Court refused to hold that a defendant in a criminal case may use out-of-court statements to mount an attack on the quality of the investigation that led to his indictment.”). The government injects confusion only to evade review by this Court.

Simply put, the Eleventh Circuit held that evidence of an inadequate police investigation into another suspect is “irrelevant” because it is not an “affirmative defense.” That “legal rule” (BIO 15) will govern every federal criminal trial in the Eleventh Circuit. And that rule will exclude powerful evidence of reasonable doubt.

II. The Decision Below Is an Egregious and Dangerous Outlier

When the decision below is accurately characterized, it cannot be defended.

1. The premise of the opinion is that defense evidence can be "relevant" *only* where it supports an "affirmative defense." But evidence is "relevant" whenever it makes the existence of any fact at issue more or less probable. Fed. R. Evid. 401. And that standard is "a liberal one." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993). So of course evidence can be relevant in the absence of an "affirmative defense." For example, where evidence makes it more probable that someone else committed the crime, that evidence would plainly be relevant. No authority supports the Eleventh Circuit's contrary assumption. Rather than defend that key premise of the decision below, the government ignores it. *See* Pet. 7, 19–20.

That premise is not just wrong; it has sweeping implications. Under the Eleventh Circuit's rationale, most criminal defendants will be unable to admit any evidence *at all*. Defendants routinely argue reasonable doubt, but that is not an "affirmative defense." And true "affirmative defenses" like insanity, duress, and self-defense are not available in the vast majority of federal cases. The upshot is that, under the rationale below, most criminal defendants in the Eleventh Circuit will be barred from admitting any evidence in their trials. That cannot possibly be right.

On rehearing, Petitioner identified these glaring problems. *See* Pet. App. 98a–101a. But the Eleventh Circuit declined to modify its opinion. Thus, only this Court can ensure that defendants in that Circuit may admit the full spectrum of relevant evidence, including evidence of their own innocence. A fair trial requires nothing less.

2. The Eleventh Circuit's reasoning is particularly indefensible where, as here, it operates to exclude evidence of an inadequate investigation. As explained in the Petition (at 16–18), this Court in *Kyles v. Whitley*, 514 U.S. 419 (1995) endorsed a reasonable-doubt defense based on evidence of an inadequate investigation into another suspect. Numerous federal and state courts have issued similar holdings. Petitioner and his amicus have cited federal cases from the Second, Fifth, Seventh, Ninth, and Tenth Circuits, as well as decisions by state courts of last resort from Massachusetts, Connecticut, Virginia, Florida, and Arizona. *See* Pet. 7–12; Clause 40 Foundation Br. 8–10, 12–13. Until the decision below, no court had said otherwise.

Tellingly, the government itself does not deny that, under *Kyles* and its progeny, defendants may seek to show reasonable doubt based on an inadequate investigation into another suspect. *See* BIO 13–15. Instead, it asserts that "nothing in [the court's] analysis" below would prevent a defendant from doing so. BIO 11–12. But that is exactly what the court did in this very case. Because an inadequate police investigation is not an "affirmative defense," the Eleventh Circuit upheld the exclusion of such defense evidence as legally irrelevant. The result is that criminal defendants cannot admit such evidence in an effort to show reasonable doubt at trial.

Properly understood, then, the decision below is not only grievously wrong; it contravenes this Court's precedent in *Kyles*, and it creates a lopsided split of authority. Only this Court can rectify these disparities. Indeed, Petitioner brought *Kyles* and contrary cases to the Eleventh Circuit's attention. Pet. App. 102a–04a & n.3. But it denied rehearing, defiantly solidifying its rogue opinion and outlier status.

3. Left undisturbed, the decision below will lead to wrongful convictions.

The government does not dispute what common sense and history teach us: people are charged with crimes they did not commit as a result of flawed or even corrupt police investigations. Thus, the wrongfully accused must be permitted to admit evidence of inadequate investigations in order to show reasonable doubt. Indeed, that may be the only way to win back their freedom. But the decision below will prevent them from doing so because, again, an inadequate police investigation is not an "affirmative defense." The result is not hard to imagine: innocent people will be convicted at trial. *See* Pet. 2, 7, 14–15; Clause 40 Foundation Br. 3, 11–14.

And that will fuel a pernicious cycle. Knowing that investigations will later be picked apart at trial encourages officers to play things by the book. Shielding investigations from such scrutiny will remove that incentive, leading to sloppy police work or even misconduct. The result: more innocent people will be charged. And, unable to show reasonable doubt based on the deficient investigation, more innocent people will be convicted. Rinse and repeat. That dynamic will maximize—not minimize—wrongful convictions. *See* Pet. 2, 16; Clause 40 Foundation Br. 13–15.

It will also channel more cases to federal court and pressure innocent people to plead guilty. Take Florida: because state defendants there may admit evidence of an inadequate investigation, officials will opt for federal charges when they fear such a defense. *See* Clause 40 Foundation Br. 12–13. Such intra-state disparity and forum shopping is problematic in its own right. But it is especially so given harsh federal penalties, which will lead innocent people to plead, not go to trial. *See* Pet. 15–16.

III. The Government's Fact-Bound Arguments Backfire

In an effort to sow more confusion, the government makes several fact-bound assertions. But this Court need not address any of them to vacate the judgment below. Regardless, they either misrepresent the record or bolster the need for review.

1. The government observes that the Eleventh Circuit alternatively affirmed based on Rule 403 (BIO 15–16), but that determination was tainted by—not independent from—the panel's primary holding. Because the panel analyzed the evidence only in terms of a non-existent "affirmative defense," the evidence would have had no "probative value" at all for Rule 403 purposes. *See* Pet. App. 65a–66a. In reality, however, evidence that the police disregarded a suspect who confessed would have had enormous probative value, both in terms of reasonable doubt and Petitioner's defense theory. *See* Pet. 3, 21. The government does not dispute that fact. Nor does it dispute that the panel's primary holding on relevance influenced its Rule 403 analysis. *See* Pet. App. 107a–08a; Pet. 6; Clause 40 Foundation Br. 4, 7.

The other half of that analysis was also tainted and flawed. The panel believed that admitting the evidence would have led to a mini-trial about the adequacy of the investigation. But the panel thought so because, again, it incorrectly analyzed the issue in terms of a non-existent "affirmative defense" based on a "reasonable officer" standard. *See* Pet. App. 68a–72a. In reality, however, the prosecution could have simply asked Officer Cabrera why he failed to investigate Deen. That's not a mini-trial; that's re-direct. The government fails to explain why that would have been objectionable. *See* Pet. App. 108a–09a; Pet. 6. The panel also believed no limiting instruction could have prevented the jury from taking Deen's confession for its truth. Pet. App. 66a–68a. But that insults the intelligence of the jury. And *Tennessee v. Street*, 471 U.S. 409 (1985) upheld the admission of a third-party confession for a non-hearsay purpose precisely because a limiting instruction was given. Continuing the trend, the government again has no response. *See* Pet. App. 106a–07a; Pet. 6.

While the panel's Rule 403 determination was wrong, this Court need not review it. The Court need only hold that evidence of an inadequate investigation into a suspect can be relevant to reasonable doubt. It could then remand for the Eleventh Circuit to conduct a new Rule 403 analysis based on that proper understanding. And armed with that understanding, the outcome should be different. Indeed, "[e]xclusion under Rule 403 is an extraordinary remedy that should be used sparingly." *United States v. Smith*, 967 F.3d 1196, 1205 (11th Cir. 2020) (quotation omitted).

2. As the government acknowledges (BIO 16), its remaining fact-bound arguments were not decided below, and so they are not before this Court. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view"). In any event, they too misrepresent the record or underscore the need for review.

a. First, the government suggests that, because Petitioner impeached the credibility of law-enforcement witnesses at his trial, future defendants will be able to challenge the adequacy of police investigations. BIO 12. But, of course, Petitioner's trial *preceded* the Eleventh Circuit's opinion. That published opinion will provide the rules governing future trials. Regardless, even assuming that *impeachment* efforts will remain permissible under the Eleventh Circuit's opinion, defendants cannot admit *substantive* evidence of an inadequate police investigation; such evidence is now legally irrelevant. And Petitioner's ability to impeach witnesses did not somehow cure the erroneous exclusion of substantive, non-hearsay evidence that the police failed to investigate another person who confessed to the crime. In that regard, it is telling that neither the trial judge nor the parties ever doubted that such evidence would be relevant. Pet. App. 15a n.16, 18a n.26, 54a–55a. That common ground among the trial participants further highlights that the Eleventh Circuit missed what everyone else intuitively grasped: the evidence was relevant to reasonable doubt.

b. Procedurally, the government asserts that the district court did not "definitively" exclude Deen's confession as hearsay. BIO 16. But the government overlooks that the Eleventh Circuit expressly found that the district court *did* definitively exclude the evidence "in the Government's case, at least." Pet. App. 56a n.65. As for the defense case, the panel failed to recognize that, after Cabrera testified for the government but before the defense case began, the district court emphatically rejected the legal basis of Petitioner's effect-on-the-listener theory. The court reasoned that this theory did not apply where the out-of-court statement had *no effect* on the listener. Pet. App. 95a, 191a. So while the panel "assume[d] arguendo" that there was a definitive hearsay ruling, Pet. App. 56a, there was nothing to assume.

The government also asserts that Petitioner failed to make an offer of proof under Federal Rule of Evidence 103(a)(2). BIO 16–17. But Petitioner addressed that issue in detail in a court-ordered supplemental letter brief. *See* Pet. C.A. Supp. Ltr. Br. 1–2 (Mar. 9, 2020). To summarize: defense counsel repeatedly proffered the testimony he sought to elicit from Cabrera—namely, that Deen walked into the police station, Deen confessed to being the passenger with the gun, and Cabrera jotted down his confession and let him go. The government did not substantively dispute that proffer. And the district court understood that proffer and ruled based thereon. That easily satisfied the flexible requirements of Rule 103(a)(2), which does not require a formal proffer or witness testimony. The Eleventh Circuit did not find otherwise.

Nonetheless, the government faults Petitioner for not eliciting Cabrera's testimony outside the jury's presence. BIO 13. But Petitioner was merely respecting the court's rulings. It had ruled that Cabrera's testimony was inadmissible in the government's case. And then after Cabrera testified for the government, but before the defense case began, the court rejected Petitioner's effect-on-the-listener theory (as explained above). That legal ruling obviated the court's earlier suggestion to hear from Cabrera. After the court (erroneously) concluded that an out-of-court statement must have *some* effect on the listener, the court's earlier suggestion became moot. All agreed that Deen's confession had *no* effect on Officer Cabrera or his investigation.

The government also faults Petitioner for not calling Deen as a witness. BIO 12–13. But Petitioner was not required to do so because Deen's confession was admissible non-hearsay. And the fact that Petitioner sought to elicit the confession through Officer Cabrera rather than Deen confirms that Petitioner was offering it for its effect on the listener (not its truth), which the Eleventh Circuit agreed would be non-hearsay. Pet. App. 57a. In any event, Petitioner could not have called Deen as a practical matter because his investigators were ultimately unable to find him.

The government speculates that Petitioner "possibly" did not call Deen because the government would have then introduced a jail call showing that the two of them had manufactured Deen's confession. BIO 12–13. But this is the ultimate backfire. If the call truly showed such a scheme, it would have proven Petitioner's guilt. And, as a statement of a party opponent, the prosecutor could have played the call whether Deen testified or not. Yet the prosecutor strategically decided *not* to play it for the jury. The reason came into sharp focus after the panel ordered the parties to submit a transcript. Not only did the call fail to show that Deen's confession was fabricated; it showed that Petitioner was innocent! It confirmed that he was the driver and that Deen was the armed passenger. Given the exculpatory nature of the call, Petitioner submitted briefing laying everything out. *See* Pet. C.A. Mtn. for Jgmt. (June 1, 2020); U.S. C.A. Response (June 10, 2020); Pet. C.A. Reply (June 12, 2020). Inexplicably, however, the Eleventh Circuit made no mention of that briefing or the transcript that it had requested. And the government now continues to invoke the prosecutor's representation at trial (BIO 17), even though it has been debunked by the actual call.

c. Also disturbing, the government argues that the error here was harmless in light of overwhelming evidence at trial. BIO 17. But the government made the exact same argument below, U.S. C.A. Br. 17–19, and the Eleventh Circuit declined to accept it. That is unsurprising given how close the trial was even without evidence of the inadequate investigation. While deliberating, the jury specifically asked whether it was "joint possession" merely to be present in a car with someone with a gun. Why would the jury ask that question unless it had doubts that Petitioner was the one with the gun? Moreover, although the trial lasted only a day-and-a-half, the jury deliberated for over three hours. That relatively long deliberation reflects that the prosecution's case hinged entirely on the credibility of the officers. And the defense eviscerated the credibility of the lead officer, using radio dispatch recordings to catch him in multiple lies on the witness stand. Given how the trial unfolded, the government could not possibly meet its burden to prove that excluding evidence of an inadequate investigation into Deen was harmless. *See* Pet. C.A. Reply Br. 22–26. And, on top of all that, there is the exculpatory jail call. In sum, there is a very real "harm" here: the lengthy imprisonment of an innocent man after a trial infected by the erroneous exclusion of evidence that would have established reasonable doubt.

IV. This Case Is a Strong Candidate for Summary Vacatur

In the end, the facts of this case vividly illustrate how wrong and dangerous the decision below is. But to resolve this case, this Court need do no more than hold that evidence of an inadequate investigation into another suspect can be relevant evidence because it can give rise reasonable doubt about the defendant's guilt. That holding is compelled by common sense, Rule 401, and *Kyles*. And every court to address that issue has agreed. But here, the Eleventh Circuit held that such evidence is irrelevant because it does not support an "affirmative defense." That holding is premised on an erroneous assumption that will govern future cases. Accordingly, this Court should vacate the judgment below and remand for further proceedings. On remand, the Eleventh Circuit should revisit its Rule 403 analysis in light of this Court's holding. And it may consider other issues that went unresolved on appeal.

Furthermore, although Petitioner would welcome plenary review and oral argument in this Court, this case is a strong candidate for summary vacatur. While that disposition is uncommon, several factors support that relief in this unusual case.

1. There is no plausible argument supporting the holding below. No court has ever suggested that evidence can be relevant only where it supports a standalone "affirmative defense" to the crime. Although that assumption is the linchpin of the decision below, neither the panel nor the government has even tried to justify it. And this Court does not need full briefing and argument to conclude that evidence of an inadequate police investigation can give rise to reasonable doubt. It is manifest.

2. The decision below will have a ripple effect across the criminal justice system. It will affect how law-enforcement officers conduct their investigations. It will affect whether charges are brought in state or federal court. It will affect the scope of discovery and *Brady* obligations. It will affect the plea offers that prosecutors extend (or withhold). It will affect whether defendants decide to plead guilty or proceed to trial. And, most important of all, it will affect whether those who have been wrongfully accused of federal crimes may be vindicated by a jury of their peers. In short, the decision below creates newfound confusion where clarity is needed. And it could take many years before this issue returns to the Court based on nothing more than the paucity of federal criminal trials and the length of the appellate process. (The trial in this very case occurred nearly *four years* ago). But time is a factor now.

3. Denying review would reward rather than penalize the government's stratagem in this Court. By mischaracterizing the relevance holding below, the government has avoided taking a position on it. Had the government accurately characterized that holding, it would have been forced to confess error, risking a GVR wiping out the precedent. Had the government instead defended the holding below, certiorari would have been more likely given the lopsided lower-court conflict. But by mischaracterizing the holding and injecting confusion where none exists, the government has complicated this proceeding with the ostensible goal of preserving a decision that eases the ability of prosecutors to obtain convictions at the expense of due process. The government should embrace its burden of proof, not dilute that burden by shielding due-process-denying precedents from review. Summary vacatur here would deter the government from employing similar tactics in future cases.

4. The Eleventh Circuit issued its relevance holding *sua sponte*. Despite issuing multiple post-argument requests for briefing and record materials, the panel never asked for briefing from the parties on the holding that it ultimately announced. Had it done so, the government may well have informed the Eleventh Circuit that it had gone off track. Petitioner sure would have. That significant departure from the adversarial process further militates in favor of vacatur. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020) (unanimously vacating a judgment because the court of appeals drastically departed from the principle of party presentation).

Relatedly, the government asserts that this case is "procedurally convoluted" (BIO 10, 15), but that is only because the Eleventh Circuit made it so. The parties themselves exhibited no confusion in their briefs to the panel. Things got "convoluted" only after the panel repeatedly hijacked the appeal in a quest to affirm and issued an excessive opinion rife with tangents and unorthodox "commentaries" speculating about counsel's strategy. Just as criminal defendants in the Eleventh Circuit should not be penalized for the government's stratagem in this Court, they should not be penalized for the Eleventh Circuit's unwarranted departure from the principle of party presentation in a straightforward day-long felon-in-possession trial.

5. Finally, this case affords the Court an easy and excellent opportunity to re-affirm that, in our criminal justice system, proving guilt beyond a reasonable doubt is sacrosanct. *See In re Winship*, 397 U.S. 358, 361–64 (1970). By "reducing the risk of convictions resting on factual error," *id*. at 363, that requirement ensures "that the moral force of the criminal law [will] not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned," *id*. at 364. Absent decisive action by this Court, the decision below will ignite such doubts and erode the moral force of the criminal law by excluding powerful evidence of reasonable doubt from jury trials. That is a recipe for wrongful convictions. Petitioner is living proof.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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